

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT K. CUMMINGS, JR. and DEPARTMENT OF THE NAVY,
PEARL HARBOR NAVAL SHIPYARD, Pearl Harbor, HI

*Docket No. 98-2130; Submitted on the Record;
Issued July 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

On August 8, 1989 appellant, then a 39-year-old marine machinery mechanic, sustained a work-related injury, which the Office accepted for acute lumbar strain, right elbow strain and right lateral epicondylitis. He received appropriate wage-loss compensation for his injuries. On December 11, 1990 the Office advised appellant that he was not entitled to further compensation for his work-related injuries in light of his refusal to accept an offer of suitable work. He subsequently returned to work, however, on December 13, 1995 he sustained another work-related injury, which the Office accepted for back and neck strain.

The employing establishment terminated appellant, effective May 24, 1996, because his physical disability prevented him from performing the full range of his duties and responsibilities as a marine machinery mechanic. He subsequently filed a claim for compensation on account of traumatic injury (Form CA-7) for lost wages due to his May 24, 1996 termination.

By decision dated August 9, 1996, the Office denied appellant's claim for compensation. The Office explained that in light of appellant's failure to accept an offer of suitable work, he was not entitled to any further compensation after December 11, 1990 for lost wages attributable to his initial injury of August 8, 1989. With respect to appellant's more recent employment injury of December 13, 1995, the Office explained that the medical evidence indicated that the accepted conditions had resolved and that appellant was capable of resuming work as of January 8, 1996. This decision was subsequently affirmed by an Office hearing representative on December 16, 1996.

Appellant sought reconsideration on January 22, 1997, which the Office denied without reviewing the merits of appellant's claim on January 30, 1997. He filed a second request for reconsideration on April 18, 1997 that was similarly denied by decision dated October 17, 1997.

The Office received another request for reconsideration from appellant on December 22, 1997. The request was accompanied by a November 13, 1997 report from Dr. Rita Kohl, a clinical psychologist. In her case treatment summary, Dr. Kohl advised that she had been treating appellant for post traumatic stress disorder (PTSD) since January 27, 1997. She further indicated that while appellant's condition was related to his prior military service in Vietnam, his recent termination from work had exacerbated his symptoms. Dr. Kohl explained that appellant had been experiencing severe depression and was twice hospitalized for attempted suicide. She concluded that appellant was not a suitable candidate for employment in the near future.

By decision dated January 9, 1998, the Office denied appellant's request for reconsideration without reaching the merits of his claim. The Office explained that the evidence submitted in support of the request was immaterial and thus, insufficient to warrant review of its prior decision. Appellant subsequently filed an appeal with the Board on July 1, 1998.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on July 1, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated December 16, 1996. Consequently, the only decisions properly before the Board are the Office's January 9, 1998 and October 17, 1997 decisions denying reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.² Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.³

Appellant's December 22, 1997 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, he did not advance a point of law or a fact not previously considered by the Office. With respect to

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

² 20 C.F.R. § 10.138(b)(1).

³ 20 C.F.R. § 10.138(b)(2).

appellant's April 18, 1997 request for reconsideration, while he argued that the Office erroneously applied or interpreted a point of law, appellant failed to demonstrate such error. In his April 18, 1997 request, appellant alleged that his rights were violated during a February 17,

1995⁴ hearing because prior to the hearing he was unaware that his compensation had been terminated for failure to accept an offer of suitable work.⁵ Under a cover letter dated August 6, 1994, appellant's congressional representative, Patsy T. Mink, forwarded to the Department of Labor a letter from appellant challenging, *inter alia*, the Office's prior determination that he refused to accept an offer of suitable work. The fact that this correspondence predates the February 17, 1995 hearing by more than six months clearly belies appellant's contention that he was unaware of the suitable work issue prior to the scheduled hearing.⁶ Thus, his allegation that he was denied a fair hearing is not supported by the record. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1).

With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, appellant did not submit any new evidence with his April 18, 1997 request for reconsideration. The Office properly determined that Dr. Kohl's November 13, 1997 report, which accompanied appellant's most recent request for reconsideration, was immaterial. His treatment summary provides no information regarding either of appellant's accepted employment-related injuries. Appellant's diagnosed PTSD has not been accepted as being related, either directly or indirectly, to his employment injuries of August 8, 1989 and December 13, 1995. Therefore, Dr. Kohl's findings regarding the debilitating effects of appellant's PTSD are irrelevant to the issues on reconsideration. As such, this evidence does not warrant reopening the claim for a merit review.⁷ Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's April 18 and December 22, 1997 requests for reconsideration.

⁴ Appellant requested an oral hearing in response to the Office's June 2, 1994 decision regarding overpayment of compensation.

⁵ Appellant argued that had he been aware of this fact, he would have either appealed the matter or submitted relevant and pertinent evidence.

⁶ Furthermore, the Office's decision from which appellant sought review by the Branch of Hearings and Review clearly advised appellant that the overpayment was the result of appellant having received compensation after he had declined an offer of suitable work.

⁷ Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

The decisions of the Office of Workers' Compensation Programs dated January 9, 1998 and October 17, 1997 are, hereby, affirmed.

Dated, Washington, D.C.
July 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member